

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

JOHN COLLIN SUTTLES, individually and on	§	
behalf of all others similarly situated,	§	
	§	
Plaintiff,	§	
	§	
V.	§	1-14-CV-505 RP
	§	
SPECIALTY GRAPHICS, INC.,	§	
	§	
Defendant.	§	

**ORDER ADOPTING REPORT AND RECOMMENDATION**

Before the Court are Plaintiff's Motion to Strike Defendant's Offer of Judgment (Clerk's Dkt. #14) and associated responses, replies and supplemental filings, as well as Defendant's Motion to Dismiss Plaintiff's TCPA Claim (Clerk's Dkt. #19) and associated responses and replies. The motions were referred to United States Magistrate Judge Andrew Austin for a Report and Recommendation on the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended. Magistrate Judge Austin filed his Report and Recommendation on February 24, 2015 (Clerk's Dkt. #44), recommending the Court deny both Plaintiff's motion to strike and Defendant's motion to dismiss.

On February 24, 2015, Defendant filed its Objection to the Report and Recommendation of the United States Magistrate Judge (Clerk's Dkt. #47), objecting to the recommendation that the motion to dismiss be denied. In light of the objections, the Court has undertaken a de novo review of the entire case file in this action and finds Magistrate Judge Austin's Report and Recommendation is correct and should be approved and accepted for substantially the reasons stated therein.

In the objections, Defendant reasserts arguments raised in support of its motion to dismiss,

all of which are addressed in the Report and Recommendation. Specifically, Defendant suggests an opinion issued by Judge Sparks in July 2013 is controlling of the issue of mootness in this action. *Masters v. Wells Fargo Bank South Cent., N.A.*, 2013 WL 3713492, at \*1 (W.D. Tex. July 11, 2013). As did Judge Austin, the Court declines to find the opinion dispositive as it predates Fifth Circuit authority addressing the issue. The Court further finds Judge Austin's consideration of current Fifth Circuit precedent appropriate, including his examination of, and reliance on the decision in *Mabary v. Home Town Bank*, 771 F.3d 820 (5th Cir. 2014). Defendant argues the decision in *Mabary* was essentially overruled by the subsequent decision in *Fontenot v. McGraw*, 777 F.3d 741 (5th Cir. 2015). However, as Judge Austin correctly noted, the Fifth Circuit has made clear "[w]hen panel opinions appear to conflict, we are bound to follow the earlier opinion." *Shami v. Commissioner*, 741 F.3d 560, 569 (5th Cir. 2014) (quoting *H & D Tire & Automotive—Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000)). Nor does the Court find Defendant's attempt to distinguish the facts in *Mabary* from those in this action persuasive. Therefore, the Court will overrule Defendant's objections.

Accordingly, the Court hereby **ORDERS** that Defendant's Objection to the Report and Recommendation of the United States Magistrate Judge (Clerk's Dkt. #47) are **OVERRULED**.

The Court further **ORDERS** that the Report and Recommendation of the United States Magistrate Judge (Clerk's Dkt. #44) is **APPROVED AND ACCEPTED**.

The Court further **ORDERS** that Plaintiff's Motion to Strike Defendant's Offer of Judgment (Clerk's Dkt. #14) is hereby **DENIED**.

The Court finally **ORDERS** that Defendant's Motion to Dismiss Plaintiff's TCPA Claim (Clerk's Dkt. #19) is hereby **DENIED**.

**SIGNED** on March 16, 2015.

A handwritten signature in blue ink, appearing to read "R. Pitman", with a long horizontal stroke extending to the right.

ROBERT L. PITMAN  
UNITED STATES DISTRICT JUDGE